In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1048.

ANTHONY J. CANON,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

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Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioner's citation of the opinion below or his statement of jurisdiction.

Questions Presented.

1. Whether the admission in evidence at petitioner's criminal trial of a transcript of an unavailable severed co-defendant's testimony at a prior civil trial violated the Confrontation Clause?

2. Whether the petitioner was denied his right to trial by jury by reason of the trial judge's instruction to the jury?

Statement of the Case.

Prior Proceedings.

On April 8, 1974, the defendant, Anthony Canon, was charged by the grand jury for Middlesex County with violations of Mass. Gen. Laws c. 268A, §§ 17(a) and 19, the conflict of interest statute. He was also charged with two counts of bribery for violations of Mass. Gen. Laws c. 268A, §§ 2(b)(1), (3) and 3(b). The defendant proceeded to trial on April 15, 1975; he was found guilty of receiving or requesting compensation for services performed or to be performed in violation of Mass. Gen. Laws c. 268A, § 17(a), but was acquitted of the other charges. He was thereafter sentenced to probation for a period of one year.

On appeal the conviction was affirmed by the Supreme Judicial Court. *Commonwealth* v. *Canon*, Mass. Adv. Sh. (1977) 2134.

Statement of the Facts.

The facts as they appear in the opinion of the Supreme Judicial Court may be summarized as follows:

Anthony J. Canon was the City Engineer of Marlborough, Massachusetts. On January 9, 1968, Canon and two other persons, Curley, a real estate broker, and Lynch, an attorney, entered into an agreement to contribute $500 each towards an investment in an option for a parcel of land within the city. The exercise of the option was contingent upon the receipt of a special zoning permit which would allow the building of apartments on the parcel of land. *Commonwealth* v. *Canon*, Mass. Adv. Sh. (1977) at 2135-2136.

Prior to the January 9, 1968, agreement, Canon had given engineering advice to the two men concerning the cost and feasibility of connecting the aforementioned parcel of land to the Marlborough sewer system. *Commonwealth* v. *Canon*, *supra*, at 2136. According to testimony from Curley and Lynch, it was at this time that Canon indicated that he intended to become part of the project and stated that his lack of participation would result in its failure to be connected to the sewer system. *Id.* On January 9, 1968, Canon met with Curley and Lynch, declared that "there's no way this is going any place without me aboard," and left his check for $500 on the table. It was agreed that the defendant would also contribute general engineering advice to the project. *Id.*

The special permit was obtained, and the land was bought for $40,000 and resold to a developer for $100,000. *Commonwealth* v. *Canon*, *supra*, at 2135. In the summer of 1968, the defendant received $5,500 as a return on his original investment of $500 and part of his share of the profit. *Id.* When no further payments were forthcoming, Canon sued Lynch and Curley for the remaining $15,000, which was his share of the profits. Lynch and Curley defended Canon's breach of contract suit on the ground that the agreement was void as against public policy, as it

violated Mass. Gen. Laws c. 268A. At the civil trial, the judge directed a verdict for Lynch and Curley and referred the case to the district attorney.

The three parties to the contract were charged with violating Mass. Gen. Laws c. 268A. Canon was convicted of violating Mass. Gen. Laws c. 268A, § 17(a), and acquitted of all other charges. He was thereafter sentenced to probation of one year. *Commonwealth* v. *Canon*, *supra*, at 2134-2135.

At Canon's trial, severed from the trials of Lynch and Curley, the Commonwealth called Curley, the real estate broker who had testified at the civil trial about the alleged illegality of the contract, as a witness. Curley was permitted by the trial judge to invoke his privilege against self-incrimination and refused to testify. The trial judge then allowed a motion by the Commonwealth to introduce Curley's recorded testimony given as an adverse witness to Canon at the civil trial. *Commonwealth* v. *Canon*, *supra*, at 2140.

Argument.

I. Admission of Prior Recorded Testimony, Subject to Cross-Examination, of a Witness who is Unavailable at a Subsequent Trial does Not Constitute a Constitutional Violation.

Testimony of a witness who is unavailable and has given testimony at a prior judicial proceeding against the same party and was subject to cross-examination by that party is admissible and not violative of the Confrontation Clause. *Mattox* v. *United States*, 156 U.S. 237 (1895); *United States*

v. *Wingate*, 520 F. 2d 309 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). The Federal Rules of Evidence permit the use of former testimony when the declarant is unavailable as a witness. Federal Rules of Evidence, Rule 804(b)(1) (1977). When prior testimony was subjected to a cross-examination with an equivalent motive and similar issues, the admission of that testimony at a subsequent trial was held not to have violated the Confrontation Clause. *Mattox* v. *United States*, *supra*; *California* v. *Green*, 399 U.S. 149 (1970); *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972).

While the nature of the two proceedings is a factor to be considered when deciding whether to admit former testimony, a court must focus on a determination of whether there was an opportunity to cross-examine and whether there is a substantial identity of issues between the prior testimony and the purpose for which it is to be introduced at a later time proceeding. *Mattox* v. *United States*, *supra*; *California* v. *Green*, *supra*, at 165-166; *Mancusi* v. *Stubbs*, *supra*. *See also*: *Bruton* v. *United States*, 391 U.S. 123, 136 (1968); *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965).

A. *Opportunity To Cross-Examine.*

The defendant called Curley as a witness in his civil case, and, under Massachusetts law, he was entitled to cross-examine him as an adverse party. Mass. Gen. Laws c. 233, § 22. The defendant was represented by counsel and had the opportunity to cross-examine the witness. The proceedings were conducted before a judicial tribunal and recorded.

There is no evidence that testimony at a civil trial is less reliable than that at a criminal trial. Respondent respectfully submits the previous testimony at the civil trial bore sufficient "indicia of reliability" to allow the trial judge to

admit it into evidence at the defendant's criminal trial. *Dutton* v. *Evans*, *supra*, at 89.

B. *Substantial Identity of Issue.*

The requirement of substantial identity of issues is to insure that the motive and interest in developing the witness' testimony in the prior hearing is similar to that which would exist in the subsequent trial. See *United States* v. *Wingate*, *supra*, at 316; Federal Rules of Evidence, Advisory Committee's Note, § 804.01. Respondent respectfully submits that, in comparing the issues in the two proceedings, the court should focus upon the issues to which the witness' testimony was directed in each instance. *United States* v. *Wingate*, *supra*; *Travelers Fire Insurance Co.* v. *Wright*, 322 P. 2d 417 (Okla. 1958); 11 *Moore's Federal Practice*, § 804.04[3] (2d ed.).

The witness in the instant case appeared as a defendant in the civil suit brought by Canon upon the identical subject matter involved in the subsequent criminal trial. Canon, in the civil suit, attempted to prove that the contract was valid and not void as against public policy. In order to overcome the other parties' defense, Canon's attorney had to establish, by examinations of Lynch and Curley, that no criminal activity had occurred which violated Mass. Gen. Laws c. 268A. Thus, cross-examination of the adverse witness would be prompted by the same motive and purpose as in the subsequent criminal trial.

There is greater similarity between the civil and criminal trials in the instant case than is usual with a criminal matter. The conflict of interest statute, Mass. Gen. Laws c. 268A, § 17(a), under which the defendant was convicted, does not require a corrupt intent on the part of the violator, as does the bribery statute. *Commonwealth* v. *Canon*,

supra, at 2145 (Liacos, J., dissenting); R. Braucher, *Conflict of Interest in Massachusetts, in Perspectives of Law, Essays for Austin Wakeman Scott*, 8 (1964).

The lack of a requirement of criminal intent as an element in the conflict of interest violation made the defendant's conviction more akin to a civil offense than the usual criminal conviction. Therefore, where there is an opportunity for cross-examination of the witness by the party against whom the testimony was introduced and there was an accurate record of the testimony, and there was a substantial identity of issues, respondent respectfully submits that the admission of the former testimony did not violate the defendant's right to be confronted with witnesses against him.

II. The Construction of a State Statute is a Matter of State Judicial Interpretation and does Not Present a Federal Question Capable of Review by the Court.

It is fundamental that the state courts are the ultimate expositors of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).

The Supreme Judicial Court found that the trial judge had correctly instructed the jury with regard to Mass. Gen. Laws c. 268A, § 17(a) *Commonwealth* v. *Canon*, *supra*, at 2139.* There is no evidence that the trial judge's instruc-

*On his appeal to the Supreme Judicial Court the petitioner did not claim a denial of his right to jury trial. Therefore, the issue is not ripe for review. The issue presented to the state court involved the sufficiency of the evidence and does not present a federal question. *Grundler* v. *North Carolina*, 283 F. 2d 798, 805 (4th Cir. 1960); *Bell Tel. Co.* v. *Pennsylvania Pub. Utility Commrs.*, 309 U.S. 30 (1940).

tions were inconsistent with the Supreme Judicial Court's interpretation of the statute or with the jury's verdict.

In addition, the defendant took no exception to the judge's instructions to the jury. *Commonwealth* v. *Canon*, *supra*, at 2139. In a case involving the jury instructions given by a federal judge, this Court characterized appellate consideration of a trial court's instruction which was not obviously prejudicial and to which the defense did not object during the trial as "extravagant protection." *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

The Court has most recently stated:

> "In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation — beyond the reading of the statutory language itself — of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. Since this omission escaped notice on the record until Judge Cardamone filed his dissenting opinion at the intermediate appellate level, the probability that it substantially affected the jury deliberations seems remote.
>
> "Because respondent did not submit a draft instruction on the causation issue to the trial judge, and because the New York courts apparently had no previous occasion to construe this aspect of the murder statute, we cannot know with certainty precisely what instruction should have been given as a matter of New York law. We do know that the New York Court of Appeals found no reversible error in this case; and its discussion of the sufficiency of the evidence gives us guidance about the kind of causation instruction that

> would have been acceptable." *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977).

Respondent respectfully submits that a review by this Court of the jury instructions in the instant case, which construe a state statute, and involve no federal question, and to which the defense made no objection, would be not only extravagant, but improper. See *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

It is a fundamental principle that this Court will not review judgments of state courts about procedural or substantive matters unless federal constitutional rights are involved. *Ward* v. *Board of County Commrs.*, 253 U.S. 17 (1920); *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

That petitioner has not raised a constitutional issue is further demonstrated by his reliance on *Bollenbach* v. *United States*, 326 U.S. 607 (1946). *Bollenbach* involves merely the exercise of the federal court's supervisory powers.

Since the petitioner cannot establish that the instructions were erroneous, it is impossible for him to show that the resulting conviction was a violation of due process, the standard necessary for review by this Court. *Henderson* v. *Kibbe*, *supra*, at 154.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix.

FEDERAL RULES OF EVIDENCE.

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. — "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. — Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of

the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. — In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. — (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or, was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if

the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Massachusetts General Laws, Chapter 233.

§ 22. [Cross-Examination of Adverse Party.]

A party who calls the adverse party as a witness shall be allowed to cross-examine him. In case the adverse party is a corporation, an officer or agent thereof, so called as a witness, shall be deemed such an adverse party for the purposes of this section.

Massachusetts General Laws, Chapter 268A.

§ 17. [Municipal Employee Not to Receive or Be Offered Outside Compensation in Relation to Certain Matters, or Act as Attorney in Such Matters; Exceptions.]

(*a*) No municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in

relation to any particular matter in which the same city or town is a party or has a direct and substantial interest.

(*b*) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(*c*) No municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

Whoever violates any provision of this section shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

A special municipal employee shall be subject to paragraphs (*a*) and (*c*) only in relation to a particular matter (*a*) in which he has at any time participated as a municipal employee, or (*b*) which is or within one year has been a subject of his official responsibility, or (*c*) which is pending in the municipal agency in which he is serving. Clause (*c*) of the preceding sentence shall not apply in the case of a special municipal employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days.

This section shall not prevent a municipal employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a municipal employee, including a special employee, from acting, with or without

compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the official responsible for appointment to his position approves.

This section shall not prevent a present or former special municipal employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the city or town; provided, that the head of the special municipal employee's department or agency has certified in writing that the interest of the city or town requires such aid or assistance and the certification has been filed with the clerk of the city or town. The certification shall be open to public inspection.

This section shall not prevent a municipal employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.